HD TANDEM
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September 16, 2019

VIA ECFS **Notice of Ex Parte**

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage, WC Docket No. 18-155

Dear Secretary Dortch:

On Wednesday, September 11, 2019, the undersigned, Josh Lowenthal and Kathryn Glaser of HD Tandem, along with Megan Delany of Delany Advisory Group, LLC, met separately with Commissioner Mike O'Reilly and Arielle Roth, Wireline Legal Advisor to Commissioner O'Rielly, Commissioner Carr and Joseph Calascione, Legal Advisor to Commissioner Carr, and Travis Litman, Chief of Staff and Senior Legal Advisor, Wireline and Public Safety to Commissioner Rosenworcel, in the above referenced proceeding to discuss the Updating of the Intercarrier Compensation Regime to Eliminate Access Arbitrage Notice of Proposed Rulemaking ("NPRM") and the Report and Order and Modification of Section 214 Authorizations.[1] On Thursday, September 12, 2019, the undersigned, Josh Lowenthal, Kathryn Glaser and Megan Delany of Delany Advisory Group, LLC met with Chairman Ajit Pai and Nirali Patel, Wireline Advisor to Chairman Pai, also regarding the above-referenced proceeding. We also met separately with Albert Lewis, Lisa Hone, Lynne Engledow, Susan Bahr, John Hunter, Gil Strobel, Erik Raven-Hansen and Allison Baker of the Wireline Competition Bureau, and Shane Taylor and Eric Burger of the Office of Economics and Analysis. Finally, we met with Randy Clarke, Acting Legal Advisor for Wireline and Public Safety to Commissioner Starks and Taylor Lamb, Legal Fellow to Commissioner Starks.

In the meetings, HD Tandem discussed the problems with the Draft Order that will prevent the Commission from accomplishing its goal of eliminating the use of intercarrier compensation to subsidize "free" high volume services. HD Tandem believes the only way the Commission can completely eliminate implicit subsidies used to support free services is to simply ban "free" high

[1] *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage,* 33 FCC Rcd. 5466 (2018) ("*Access Arbitrage NPRM.*") Report And Order And Modification Of Section 214 Authorizations ("Draft Order") (Sept. 5, 2019).

voice application services entirely or move the industry immediately to a bill-and-keep system. Yet, HD Tandem believes it is problematic for the Commission to involve itself in consumer pricing, especially given that "free" voice application services are preferable to the consumer than the "pay" voice application services, which are also subsidized by intercarrier compensation, but cost more for the consumer.

By way of example, conference calling provider A offers a "free" conferencing service subsidized with intercarrier compensation. Conference calling provider B offers a "pay" conferencing service. Both conference calling providers in the example use toll access numbers and are subsidized with the same intercarrier compensation regime. However, conference company B charges an additional 6 cents per minute to its single customer while the majority of call participants access the service for free as their phone providers pay access fees for that service. Now, the Commission argues that free services artificially increase demand, but regardless of consumer pricing, the majority of callers access voice application services for free. Considering both "free" and "pay" voice applications are subsidized by intercarrier compensation, banning the use of intercarrier compensation on just "free" services would enable the use of intercarrier compensation to subsidize "pay" services only. [2]

HD Tandem informed the FCC that the LECs targeted by this NPRM and Draft Order also host many "pay" services, and that those pay services will not be spared by the proposed 6:1 trigger. HD Tandem went further to discuss how the Draft Order will NOT eliminate the use of intercarrier compensation to subsidized "free" or "pay" services, instead, the Draft Order will create disruption in both the "free" and "pay" services at what the Commission incorrectly believes will only be a small handful of rural LECs.

Only a small handful of LECs subtend CEA services and historically IXCs have been forced to send their traffic through these providers, such as Aureon. Significantly, the Draft Order, as written, enables these LECs to subtend different tandems and allows IXCs to send traffic a way other than the CEA tandem. For the first time, these LECs can now choose a more efficient call path by changing their composite mileage, the combination of tandem and end office mileage. Therefore, these rural locations can now compete with ILEC rates found in major metros: New York, Chicago, Los Angeles and Miami. For the last 7 years, HD Tandem has provided a likewise intermediate service that does not have a mileage component. The service has become very popular, grown dramatically, and carries roughly 80% of the volume for LECs it delivers traffic too.

Now, it is important to note that LECs in urban areas such as New York, Chicago, Los Angeles and Miami host the very same voice application services currently found at the aforementioned LECs, and yet generally would not trip the triggers set forth in the Draft Order. HD Tandem warned that because this Draft Order is not eliminating the use of the intercarrier compensation system to subsidize "free" or "pay" services at all LECs nationwide, that some of the multi-billion voice application minutes at HD Tandem would migrate away from the LECs in peril of becoming designated "access stimulating" LECs and migrate to non-access stimulating LECs that may also share revenue on the traffic received. This is why HD Tandem believes that the Draft Order will not eliminate the use of intercarrier compensation to subsidize "free" or "pay" services. It will only steer the traffic away from the carriers that are unable to avoid tripping the

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[2] *At&T Corp. v. Level 3 Commc'ns, LLC*, Civil Action No. 18-cv-00112-RM-MEH (D. Colo. Aug. 1, 2018)

6:1 trigger. Thus, HD Tandem concludes that the most effective way to reform access stimulating LECs is to mandate price changes. Rate disparities are one of the root causes of arbitrage opportunities and thus, instead of implementing a new untested traffic ratio trigger, the Commission should focus on equalizing compensation.

HD Tandem offered the Commission a view of its foreseeable future plans stating it would not be able to offer no-cost voice transmission services to IXCs, and that the IXCs will have to use the regulated tandem that each LEC chooses for themselves. For this reason, HD Tandem believes voice application traffic currently hosted by rural LECs will migrate from HD Tandem to the likes of Aureon or alternative tandems at the LECs' choosing. HD Tandem did not pretend to know exactly how much will migrate or to whom, that might be a better question for the IXCs, but it would make sense that at least some IXCs would seek the relief they hope is in this Draft Order by shifting traffic back to the regulated call path. Seeking that relief would require them to move away from HD Tandem and in doing so, it would leave stranded state of the art technology in exchange for investing in Aureon's Legacy TDM network, and thus devolving technology advancement.

The resulting exodus of the HD Tandem network will likely cause enough irreparable harm that it will destroy the company's presence across the network of LECs it currently serves in Iowa and South Dakota. HD Tandem cautioned that Aureon and SDN combined only have 20,000 physical ports connected to the LECs subtending their CEA tandem. HD Tandem on the other hand currently has nearly 500,000 ports serving those same LECs. HD Tandem has an astounding 100,000 ports of concurrent usage across these LECs, plus headroom for growth, along with standby redundancy and failover options, and alternative routing options or for capacity totaling 500,000 ports. Considering this stark divergence of technology, Aureon will likely be unable to to handle the traffic that will most likely be migrating to its network within the impossibly short 45 day time allotted for transition in the Draft Order. A major shift of traffic to a carrier with inadequate capacity will certainly cause substantial call completion issues and service disruptions.

HD Tandem also discussed that since the Commission believes that the 6:1 traffic ratio will trap a small number of CLECs, many other CLECs not in peril of tripping such triggers will be open to host "free" high volume services subsidized by intercarrier compensation. Additionally, however, HD tandem believes the proposed 6:1 trigger may indeed trap a larger universe of CLECs than the FCC expects, outside of the current rural CLECs targeted. This is best evidenced by the NTCA's September 11, 2019 *Ex Parte*, claiming that 24 new carriers would be deemed access stimulators and another 9 on the bubble, with more being caught by the trigger each month as originating access is steadily shifting away from LECs. The FCC dismissed the NTCA's concerns in this vein in the Draft Order, but since that time, NTCA has provided additional data demonstrating its concerns are concrete.[3] HD Tandems believes the NTCA example is only the tip of the iceberg of unintended victims. The Commission could not have intended to cast such a wide net.

HD Tandem further explained how traffic would move from application to application and service to service where one application is based in a LEC that trips the trigger and another application hosted at a LEC that does not trip the triggers. Frequent, large shifts of traffic in such a manner will cause immense customer frustration and pricing confusion.

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[3] *See* NTCA Ex Parte. Pg.2. (9/11/19)

HD Tandem went even further down the "rabbit hole" to explain how the Draft Order somehow expected the consumer to change voice application services, from "free" to "pay" services, which would also move traffic unnecessarily. As the FCC stated "After the implicit subsidies are eliminated, customers who were using the "free" services, and who value these services by more than the cost of providing them, will continue to purchase these services at a competitive price."[4] Yet the immediate effect will be rapid and economically damaging disruption of services to the 75 million unique users this year who have called voice application services at the rural LECs that HD Tandem terminates to.

In sum, the Draft Order is written in a way that it will not achieve its stated goal of eliminating the use of intercarrier compensation to subsidize "free" high volume services. The Draft Order, as currently proposed, will only eliminate the use of intercarrier compensation for the specific LECs that trip the 6:1 trigger and not other LECs. Moreover, the 6:1 trigger alone may trap a much larger number of LECs than the FCC anticipated when writing the proposed order. In fact there are likely a large number LECs that are unaware of the impact of this proceeding, and a larger audience of commenters is needed before the Commission can proceed with its Draft Order. HD Tandem also noted that the Order does nothing to solve for arbitrage so long as the 6:1 trigger is not tripped, since no price changes are made.

HD Tandem discussed how the 6:1 ratio was first presented as a standalone trigger in the Draft Order providing insufficient time for comment. Previously, it had been submitted as a group of triggers similar to the revenue sharing, 3:1 ratio and 100% growth triggers the Commission vetted in the 2011 CAF order. Just like those triggers, these have a completely different impact when implemented individually. HD Tandem is deeply concerned that resulting ambiguity in the industry will lead to disputes, complaints and decade-long lawsuits that will certainly cost more than the $80 million problem being addressed, not to mention Commission resources diverted from more important matters.

HD Tandem lamented the Commission's abandonment of a primary mileage trigger, opining that while such a trigger would not eliminate the use of the intercarrier compensation to subsidize "free" or "pay" services, it would indeed eliminate the price disparities found in the marketplace and, thus ,eliminate the arbitrage that the Order intends to debilitate. Moreover, since the Draft Order releases the LECs of their requirement to receive traffic down routes dictated by regulations (e.g., CEA Tandems), and provides a new found freedom to home to other tandems without the mileage component, price disparities with mileage would be eliminated, along with the corresponding arbitrage. Consistent with the intention of this proceeding, a mileage-based trigger along with its ability of network choice, will compel the LEC to select an efficient call path, or be subjected to Prong 1.

HD Tandem believes the Commission should revisit the issue of mileage elimination as a primary trigger in determining who is and who is not an Access Stimulating LEC. Mileage is a crystal clear and obvious solution to the Commissions stated problem and intention of this NPRM. Limitations on mileage combined with the elimination of the CEA mandated use policy will allow LECs to choose a new path forward to compliance for the first time. Instead, Prong 1 treatment will obligate these LECs to eliminate arbitrage by re-homing to a tandems that have

[4] *See* Draft Order at 27.

the same rates as those found elsewhere in the country and the ability to host both "free" and "pay" services alike. By eliminating the opportunity for access arbitrage, LECs can compete on a level playing field across the country within the intercarrier compensation system. A competitive marketplace is what the Commission should strive for. At that point, the Commission can turn its sights towards marching the entire industry towards its vision of bill-and-keep.

Implementation of a mileage trigger would result in clearer boundaries for compliance than access traffic-based ratios, access traffic volume, or even revenue sharing. Considering the dramatic impacts of Prong 1 and financial incentives for carriers to enforce the treatment, the Commission should be laser focused on ensuring its new rules leave little ambiguity and zero consumer disruption. A mileage trigger would necessarily include the composite mileage rate of both the end office and the tandem, since the LECs can now avoid the high cost associated with the CEA. Those that believe a mileage trigger will only prolong the problem do not understand that the 6:1 trigger may not actually trap all targeted LECs, but trap unintended LECs. What is worse is that the problem is going to persist because the Commission has not eliminated the subsidy industry-wide. Alternatively, the Commission should simply focus on moving rate-of-return carriers and CLECs to bill-and-keep immediately.

Respectfully Submitted,
/s/ David Erickson
David Erickson
President

Cc:

Chairman Ajit Pai
Commissioner Brendan Carr
Commissioner Michael O'Rielly
Susan Bahr
Allison Baker
Eric Burger
Joseph Calascione
Lynne Engledow
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